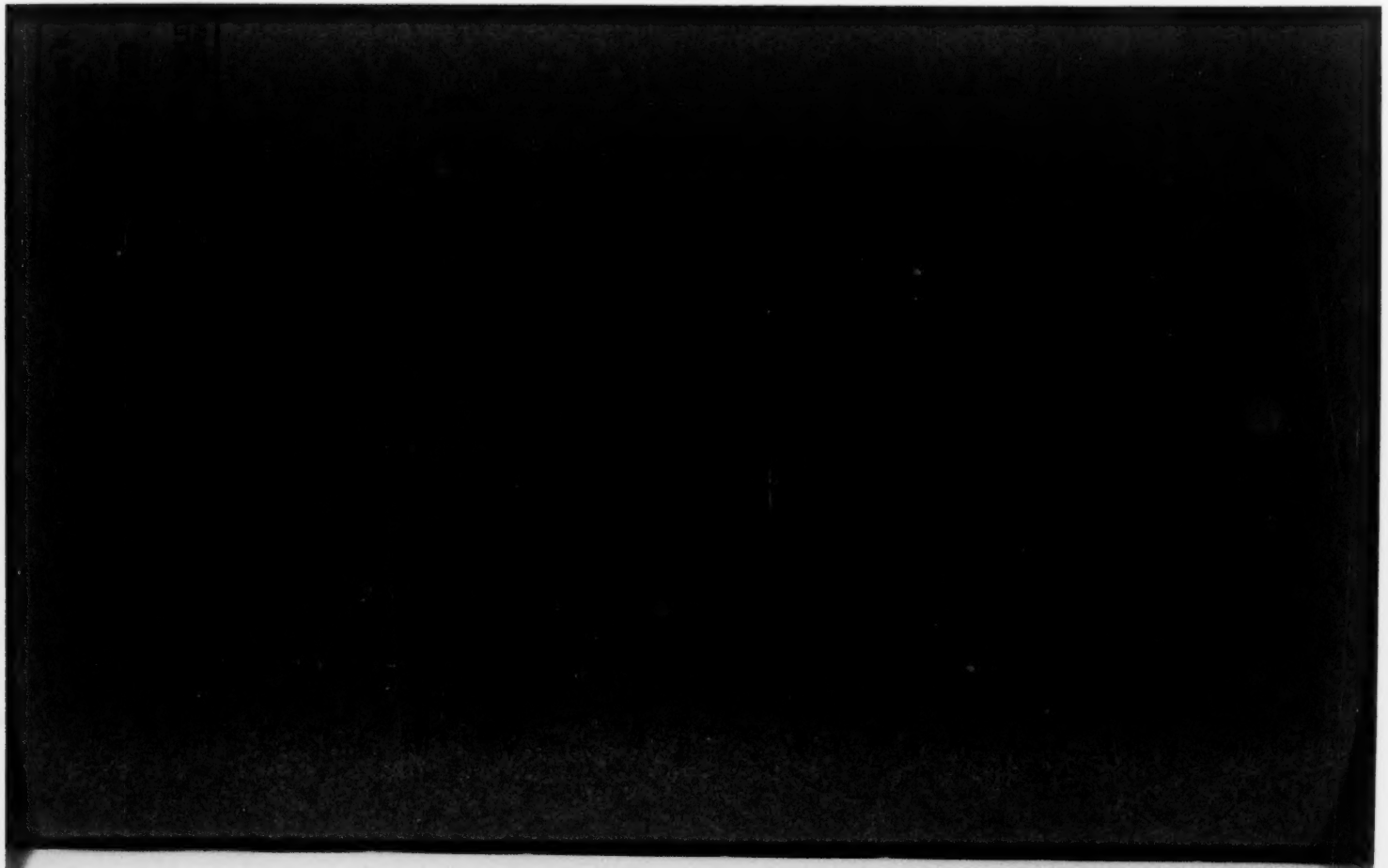

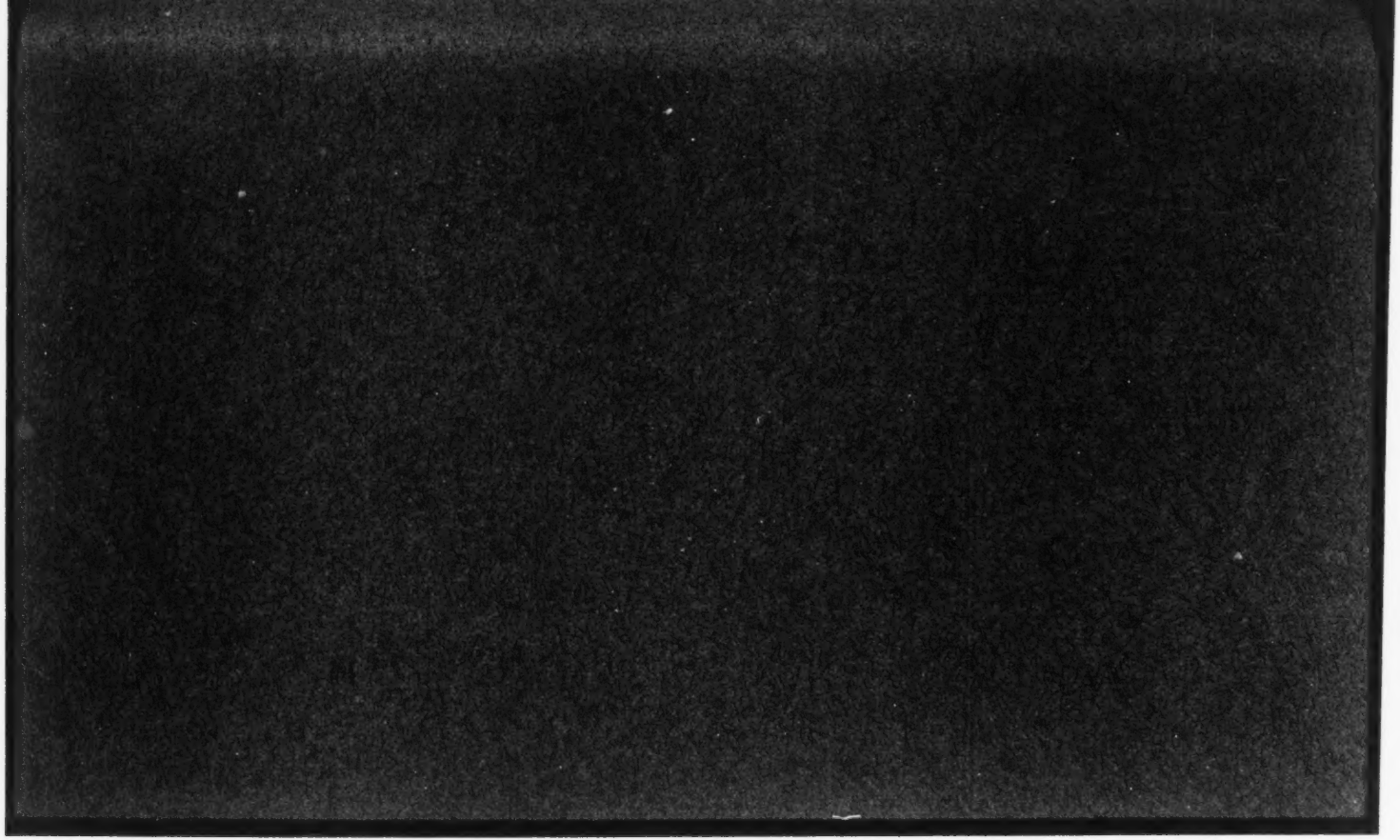

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554746—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 320

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 125–130) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 5, 1943 (R. 131). The petition for a writ of certiorari was filed September 4, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, (herein sometimes termed "the Act"),

making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTION PRESENTED

Whether maximum price regulations issued by the Price Administrator are invalid under the Emergency Price Control Act of 1942 insofar as they prohibit increases in petitioner's zone-delivered prices to compensate for the 3% transportation tax imposed by the Revenue Act of 1942.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, c., 578, 56 Stat. 767, appear in the Appendix, *infra,* pp. 13–20. Supplementary Order No. 31, relating to the transportation tax under the Revenue Act of 1942, appears at R. 112–114. The basic price regulations appear at R. 62–78 and R. 98–109.

STATEMENT

Petitioner operates a manufacturing plant at Midland, California, from which it sells gypsum products to purchasers located in California, Arizona, and Nevada. In certain sections of these states petitioner sells its products at f. o. b. mill prices, with the result that variations in transportation expense are borne by the purchasers. In other sections of these states, however, petitioner sells its products at delivered prices which are uniform throughout such sections in spite of vary-

ing transportation costs.[1] It is the practice in such areas for the purchaser to pay the freight to the railroad on receipt of the goods, and remit to petitioner the difference between this freight payment and the uniform price. (R. 36–37.) Petitioner has challenged the validity of applicable price regulations only in so far as they apply to these zones of uniform delivered prices.

On April 28, 1942, the Price Administrator issued the General Maximum Price Regulation, Section 1499.2 of which established maximum prices at "the highest price charged by the seller during March 1942" (R. 64). On July 29, 1942, there was issued Maximum Price Regulation No. 188, which superseded the pricing provisions of the General Maximum Price Regulation with respect to sales by manufacturers of a number of commodities, including the petitioner's gypsum products, but which, like the General Maximum Price Regulation, established maximum prices on the basis of the highest prices charged during March 1942 (R. 100).[2]

[1] Petitioner contended below that even in the areas where total costs to purchasers were uniform, f. o. b. mill prices had been established rather than delivered prices. Petitioner now concedes, however, that in these zones delivered prices have been established (Pet. 3, n. 5).

[2] Those sections of the General Maximum Price Regulation which were not superseded "together with existing and subsequent amendments and supplementary regulations" were incorporated by reference into Maximum Price Regulation No. 188 (R. 99).

On December 1, 1942 a transportation tax of 3% became effective under Section 620 of the Revenue Act of 1942. To meet the price problems created by this tax, the Price Administrator on November 26, 1942 issued Supplementary Order No. 31, which provided that under all maximum price regulations not specifically exempt from its provisions, the transportation tax shall "be treated as though it were an increase of 3% in the amount charged by every person engaged in the business of transporting property for hire". (R. 112.) This Order thereby limited the effect of Section 1499.7 of the General Maximum Price Regulation and comparable provisions contained in a number of other regulations which permitted certain classes of taxes to be separately stated and passed on to purchasers, who in turn could pass on this tax payment on resale of the commodity (R. 69).[3]

On December 17, 1942, petitioner filed with the Price Administrator a protest which attacked the validity of the General Maximum Price Regulation and Maximum Price Regulation No. 188, as modified by Supplementary Order No. 31, in so far as they prohibited petitioner from increasing

[3] The General Maximum Price Regulation and Maximum Price Regulation No. 188 were not excepted from the operation of Supplementary Order No. 31 and hence were governed by its provisions. Moreover, on December 11, 1942, the General Maximum Price Regulation was amended by specifically adding the terms of Supplementary Order No. 31 to Section 1499.7 (R. 71, 97).

its uniform delivered prices to compensate for the 3% transportation tax (R. 30–50). The protest was denied by the Price Administrator (R. 51–61), and the petitioner thereupon filed a complaint with the United States Emergency Court of Appeals (R. 1–8, 23). The court dismissed the complaint, holding that the maximum price regulations in question fully complied with the standards set forth in the Emergency Price Control Act. (R. 125–130.)

ARGUMENT

It is of some significance that no other complaint raising the issues which petitioner presents has been filed in the Emergency Court of Appeals; nor has any similar protest been filed with the Administrator; and the period for filing such a protest under Section 204 (a) of the Act, directed to Supplementary Order No. 31 of November 26, 1942, has long since expired. It is submitted, furthermore, that the objections urged by petitioner are plainly without merit, for the reasons which follow, and therefore that the case does not warrant further review.

I. THE APPLICABLE MAXIMUM PRICE REGULATIONS HAVE NOT REQUIRED REDUCTION IN PETITIONER'S PRICES

The greater part of petitioner's brief is devoted to attempts to show that the applicable maximum price regulations are invalid under various provisions of the Emergency Price Control Act on

the ground that they have required reduction in petitioner's prices. In the proceedings below, this position was premised upon the contention that even in its zones of uniform delivered prices, petitioner's prices were really the varying amounts which resulted after deducting transportation expense from the uniform zone price. There is no dispute that, so stated, petitioner's mill "prices" were reduced by the increased transportation expense occasioned by the transportation tax under the Revenue Act of 1942.

The court below, however, concurred in the Price Administrator's finding that in the zones here involved petitioner had established delivered prices, and that consequently petitioner's prices have not been reduced by the increased delivery expense resulting from the transportation tax. In the face of this holding, petitioner has now abandoned its former contention and concedes that the prices now involved are delivered prices (Pet. 3, n. 5).

In view of this concession, it is difficult to follow petitioner's arguments based upon the contention that its prices have been reduced. The most that petitioner could have shown is that its net return at the mill has been slightly reduced. However, petitioner has produced no evidence that it or other members of the industry are subjected to hardship by this increase in delivery expense or that the maximum prices are not "generally fair

and equitable" under this broad standard for the validity of maximum price regulations set forth in Section 203 (a) of the Act.

In any event, the concession that petitioner has established delivered prices in the areas in question renders untenable petitioner's various arguments based upon the assertion that maximum price regulations have required reduction in its prices. This inescapable conclusion was clearly stated by the court below (R. 129):

> It is argued by complainant that the order compels it to reduce its prices in violation of the act. Without considering under what circumstances the Administrator may reduce prices it is clear to us that he has not done so in this case. For, as we have already shown, complainant's maximum prices in the areas in question are its uniform delivered cost figures. These it is not directed to reduce but merely to maintain intact without increase by reason of the transportation tax.

Petitioner nevertheless contends that "the court should have considered the circumstances under which the Price Administrator may reduce prices" (Pet. 11).[4] Petitioner further observes that the application of the standards fixed by Congress in

[4] Section 2 (c) of the Act specifically provides that maximum prices may be established "below the price or prices prevailing * * * at the time of the issuance of such regulation or order."

connection with the purposes of the Act has never been before this Court and urges that a determination of the extent of the Price Administrator's power is of general importance to all sellers of commodities subject to price control (Pet. 10). The court below, however, quite properly refrained from deciding the hypothetical issues which would be presented only upon petitioner's premise that its prices have been reduced.

II. THE APPLICABLE MAXIMUM PRICE REGULATIONS COMPLY WITH THE REQUIREMENT OF SECTION 2 (a) OF THE ACT THAT REGULATIONS SHALL, IN THE JUDGMENT OF THE ADMINISTRATOR, EFFECTUATE THE PURPOSES OF THE ACT

Petitioner contends that Supplementary Order No. 31 is invalid on the ground that it was "not directed to carrying out the purposes of the Act" (Pet. 14). This assertion ignores the consideration, fully set forth in the Administrator's opinion which accompanied the order denying the protest, that these regulatory provisions serve the basic purpose of the Act in preventing general increases in the prices of petitioner's gypsum products, as well as increases in the prices of numerous other sellers of countless commodities (R. 57–58).

If Supplementary Order No. 31 had not been issued, under Section 1499.7 of the General Maximum Price Regulation and similar provisions in other regulations, transportation taxes at each stage of distribution could have been passed on

through many hands to the ultimate consumer. Where transportation charges occurred at more than one stage of distribution, the tax upon each transportation charge could have been passed on, with the result that the tax upon a number of shipments would have been borne by the consumer, or by an intermediate seller who found it impossible separately to state the tax. The regulatory provisions under attack thus prevented accumulation of the transportation tax and distributed its burden by requiring that it be borne by one of the parties to each transaction in which transportation expense is incurred. The transportation tax was nation-wide in scope, applied to virtually all commodities, and was imposed at a critical stage in the effort to hold the price line. It is thus quite clear that the Price Administrator's action in preventing the inflationary effect of pyramiding this tax was fully in harmony with the basic purpose of the Act to prevent inflation and the statements of that basic purpose set forth in Section 1 (a) of the Act.

Petitioner further attacks one objective of the regulations—namely, avoidance of the uncertainty and confusion which would arise from the passing on of the tax—and asserts that the real reason for issuance of Supplementary Order No. 31 was "that the Price Administrator considered it desirable to have uniformity of business practices with

respect to treatment of the tax by sellers" (Pet. 13). In answer to this contention it is sufficient to quote the language of the court below (R. 129):

> There is likewise no merit in complainant's contention that by this order the Administrator was seeking to control business practices in violation of the act. It is obvious that what he sought to do was to determine the parties by whom the tax was to be borne and to prevent its being passed on to ultimate purchasers.

III. THE REGULATORY PROVISIONS IN QUESTION ARE "OF GENERAL APPLICABILITY AND EFFECT" AND DO NOT DISCRIMINATE AGAINST PETITIONER

The final contention made by petitioner is that the General Maximum Price Regulation and Maximum Price Regulation No. 188 violate the provision of section 2 (a) of the Act that "the term 'regulation or order' means a regulation or order of general applicability and effect." Petitioner bases its objection upon the fact that it and others similarly situated have had the transportation tax "rolled back to them and their prices reduced, while other sellers do not have the tax rolled back to them" (Pet. 20).[5] Petitioner thus contends

[5] This contention, to the extent that it is based upon the assertion that its prices have been reduced, is of course foreclosed by the finding of the court below and by petitioner's concession to this Court that in the areas in question petitioner established delivered prices, which the price regulations hold firm in spite of the increase in delivery expense.

that illegal discrimination arises from the fact that in areas where petitioner and other sellers have established f. o. b. mill prices, buyers must absorb the tax, whereas petitioner and other sellers must absorb the tax on sales in delivered price zones.

However, the basic classification between f. o. b. mill prices and delivered prices does not, as petitioner asserts, single out petitioner and others for special treatment, but is a necessary result of the equal application of regulatory provisions of the widest applicability. Moreover, section 2 (c) of the Act provides that maximum price regulations "may contain such classifications and differentiations * * * as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act." Any doubt which might remain as to the Price Administrator's authority to establish the classification under attack is completely answered by the fact that both the Senate and House Reports which accompanied the price control bill stated expressly that section 2 (c) authorized classifications "in terms of delivered prices on the one hand and f. o. b. prices on the other." [6]

[6] Sen. Rep. No. 931, 77th Cong., 2d Sess. (1942), 17; H. Rep. No. 1409, 77th Cong., 1st Sess. (1942), 6. The language of the Senate Report is quoted more fully in the opinion of the court below (R. 130).

CONCLUSION

The decision below is clearly correct, and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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